STATE OF MICHIGAN

IN THE SUPREME COURT

JENNIFER BUHL,

Plaintiff-Appellant,

V

CITY OF OAK PARK,

Defendants-Appellees.

Michigan Supreme Court
Docket No. 160355

Court of Appeals
Docket No. 340359

Oakland Circuit Court
Case No. 2017-157097-NI

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Plaintiff-Appellant Jennifer Buhl's
Reply In Support of Her Application for Leave to Appeal

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Introduction

The City's response to Ms. Buhl's application for leave to appeal does not defend the Court of Appeals' new "*Brewer* restoration rule." Instead, the City argues that the January 2017 amendment to MCL § 691.1402a(5) did not actually "change" the law because the open and obvious defense "has always been available to municipalities" under the statutory regime. (City Br. at 10, 17). But that argument is just as indefensible as the Court of Appeals' analysis. The City itself admits that the amendment was passed in order to "repudiate" this Court's decision in *Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002). In doing so, the amendment added text to the statute that gave municipalities an additional defense that did not exist under this Court's prior, binding interpretation of the statute.

Like the Court of Appeals, the City's arguments boil down to an assertion that the January 2017 amendment applies retroactively simply because it was a response to *Jones*. But that assertion ignores the entire retroactivity analysis. The Legislature is certainly free to amend statutes in response to this Court's opinions. But that does not mean that those amendments apply retroactively. In fact, the presumption is the *opposite*: "Even if the Legislature acts to invalidate a prior decision of this Court, the amendment is limited to prospective application if it enacts a substantive change in the law." *Brewer v AD Transp Exp, Inc*, 486 Mich 50, 55–56; 782 NW2d 475 (2010) (quoting *Hurd v Ford Motor Co*, 423 Mich 531, 533; 377 NW2d 300 (1985)).

The alternative rationale offered by the City is no more defensible than the reasoning of the Court of Appeals. And unless this Court addresses that reasoning, it will continue to bind the Court of Appeals in all cases where the retroactivity of a statutory amendment is at issue. This Court should grant leave to appeal.

Argument

I. The City does not defend the Court of Appeals' new "*Brewer* restoration rule."

The City does not defend the flawed retroactivity analysis outlined in Judge Tukel's majority opinion. Nor could the City do so. The majority opinion's construction of a "*Brewer* restoration rule" is inconsistent with both *Brewer* itself and also with the rest of this Court's retroactivity jurisprudence. Further, a few months before the Court of Appeals' decision in this case, a separate panel of the Court of Appeals unanimously came to the opposite conclusion on exactly the same question that was decided in this appeal. *See Schilling v City of Lincoln Park*, unpublished opinion per curiam of the Court of Appeals, issued May 16, 2019 (Docket No. 342448), 2019 WL 2146298, at *5 (App. 41a). In all, four Court of Appeals judges (Judges Letica, Sawyer, Cavanagh, and Servitto) agreed that the January 2017 amendment is prospective-only; only two judges (Judges Tukel and O'Brien) concluded that it was retroactive.

Judge Tukel's majority opinion in this case, however, is a published opinion, and it will continue to be binding authority on the Court of Appeals unless this Court grants leave and reverses it. If the majority opinion is not reversed, it will require lower courts to retroactively apply amended statutes whenever the amendment supposedly "restores" a nebulous preexisting status quo. That analysis is fraught with difficulty and inverts the presumption against retroactivity. It has also never been part of this Court's retroactivity jurisprudence. This Court should grant leave so that the Court of Appeals' published opinion does not continue to warp the lower courts' retroactivity analysis.

II. The City's argument fails to identify an alternative basis for upholding the Court of Appeals' decision.

Instead of defending the Court of Appeals' analysis, the City tries to salvage the majority's holding by advancing an alternative argument that is equally flawed. The City

repeatedly insists that the January 2017 amendment changed nothing whatsoever because the open and obvious defense "always" existed under MCL § 691.1412, even before MCL § 691.1402a was amended. But this Court's binding decision in *Jones* unmistakably precluded municipalities from asserting that defense for the better part of two decades. Indeed, the City admits that the January 2017 amendment was intended to abrogate *Jones*' substantive ruling. None of the City's arguments squarely addresses the factors that are relevant to retroactivity. The City's alternative theory for affirmance is meritless.

A. There is no support for the City's claim that the open and obvious defense was "always" available to municipalities.

The City claims that the 2017 amendment merely re-stated a defense that had always existed. (City Br. at 11). The City repeatedly argues that the open and obvious defense "has always been available to municipalities" under the statutory regime, and that the January 2017 amendment did not "change" MCL § 691.1402a. (City Br. at 10, 17). According to the City, this means that the Legislature did not need to have any intent to have the amendment apply either "retrospectively or prospectively," because the amendment simply stated the already-existing state of the law, without changing anything at all. (*Id*. at 11, 14).

The City argues that "2016 PA 419 vested Defendant with no defense that Defendant did not have before." (City Br. at 18). But of course it did. Before the January 2017 amendment, this Court's binding authority precluded municipalities from asserting the open and obvious doctrine against claimants like Ms. Buhl. *See Jones*, 467 Mich at 270. In fact, municipalities had been precluded from asserting that defense for more than 20 years. *See Walker v City of Flint*, 213 Mich App 18, 23; 539 NW2d 535 (1995). The January 2017 amendment added subsection (5) to MCL § 691.1402a, providing that municipalities "may assert, in addition to any other defense available to it, any defense available under the common

law with respect to a premises liability claim, including, but not limited to, a defense that the condition was open and obvious." (App. 32a). The City cannot claim with a straight face that the open and obvious defense "always" existed because the defense unquestionably was not available to municipalities for more than 20 years.

The City's position is also internally incoherent. The City argues that the January 2017 amendment "abrogate[d]" *Jones*. (City Br. at 10). But the amendment could only have abrogated *Jones* if it substantively changed MCL § 691.1402a to specifically allow municipalities to assert the open and obvious defense—which is exactly what the 2017 amendment did.

Nevertheless, the City argues that "it is disingenuous to assert that the Legislature did not always intend for MCL 691.1402a and MCL 691.1412 to mean what they have always said . . ." (City Br. at 15). This argument is nonsensical. After the January 2017 amendment, the text of MCL § 691.1402a substantively changed in order to abrogate *Jones*, as the City itself asserts. After the addition of § 691.1402a(5), the statute no longer says what it "ha[s] always said." (City Br. at 15). It now has additional words that have added a new, substantive provision to the text.

The City's theory in this case is not supportable. The City is engaged in an elaborate pretense that the January 2017 amendment did nothing at all, even though the amendment changed the statutory text to add an affirmative defense in subsection (5) for the specific purpose of abrogating binding authority from this Court that would otherwise preclude the defense. The Court of Appeals' decision to create a "*Brewer* restoration rule" out of thin air is indefensible, and the City's assertion that the January 2017 amendment did not effect "a substantive change in MCL 691.1402a at all" fares no better. (City Br. at 14).

B. The City's argument begs the question of retroactivity.

The City's argument also begs the very question that it is required to prove. The City claims that, by amending MCL § 691.1402a to abrogate *Jones* and to be consistent with what the Legislature "always" intended, the Legislature necessarily also intended for the amendment to apply retroactively, such that it would be "redundant[ ]" for the Legislature to actually say so. (City Br. at 15).

But amending a statute and intending that the amendment apply retroactively are two different things. The mere fact that the Legislature amends a statute does not mean that the Legislature also intends for the amendment to apply retroactively. Here, for example, the Legislature could have intended for the January 2017 amendment to reflect its intent that *Jones* was mistaken and that *Jones* would no longer be the law *from now on*. In fact, that is exactly the interpretation that this Court has always required: courts must presume that legislative amendments apply only prospectively, not the other way around, "[e]ven if the Legislature acts to invalidate a prior decision of this Court." *Brewer*, 486 Mich at 55–56 (quoting *Hurd*, 423 Mich at 533). A legislative amendment is prospective-only unless the legislature's intent is proven to be otherwise.

The problem with the approaches adopted by the City and by the Court of Appeals is that they invert this presumption. That is, these approaches presume that legislative amendments apply retroactively instead of prospectively. The City, for example, presumes that the Legislature determined that the open and obvious doctrine should have "always" been available to the City and that the Legislature also intended—without saying it—that the defense should be available retroactively. The Court of Appeals likewise presumed that the Legislature not only "told us that the *Jones* decision never should have applied" but also that the January 2017 amendment should apply to claims that had already accrued. (App. 18a). But both

approaches employ the wrong presumption. The presumption must be against retroactivity, not in favor of it. *Johnson v Pastoriza*, 491 Mich 417, 429; 818 NW2d 279 (2012). The courts must assume that, even if the Legislature "told us that the *Jones* decision never should have applied," the Legislature nevertheless determined to change the law on a going-forward basis only—unless the Legislature says otherwise, which it did not do here.

That is a fundamental reason why the Court of Appeals' newfound "*Brewer* restoration rule" is wrong. It flips the presumption against retroactivity, contrary to this Court's uniform jurisprudence. As noted in Ms. Buhl's application for leave, *Brewer* did not adopt such a rule. The Court of Appeals has construed *Brewer* to mean the opposite of what *Brewer* actually held, and the opposite of what this Court's retroactivity jurisprudence uniformly requires. The City's response does not dispute any of this. Rather, the City advances an alternative approach that suffers from the same flaw.

C. The City improperly argues that the Legislature's intent can be determined by reference to the general historical context years before the amendment's enactment.

The City only touches on the factors that control the retroactivity analysis; it does not address them directly. And even when the City touches on the factors, its analysis is incorrect. For example, the City claims that it is a mistake to "attribute significance" to the fact that the 2017 amendment was given immediate effect rather than retroactive effect. (City Br. at 14). But this Court's precedent requires that significance be attributed to such language. "Use of the phrase 'immediate effect' does not at all suggest that a public act applies retroactively," but instead indicates the opposite. *Johnson*, 491 Mich at 430.

Instead of focusing on the relevant factors, the City takes the Court on a tour of the history of governmental immunity, arguing that the broad context of the decades-long debate over the proper scope of governmental immunity is conclusive evidence of the Legislature's

intent on the day in January 2017 when it amended MCL § 691.1402a. (City Br. at 11-14). For good reason, this Court's retroactivity jurisprudence has never attempted to divine legislative intent from these sorts of broad, amorphous, years-long legal debates. The focus is instead on the statutory text and on whether the amendment is substantive (indicating that the legislature did not intend for it to apply retroactively, due to the fairness problems that would pose) as opposed to procedural (indicating that the legislature did intend for it to apply retroactively, as a procedural update would not affect the merits of a claim that had already accrued). *See LaFontaine Saline, Inc v Chrysler Grp, LLC*, 496 Mich 26, 38-39; 852 NW2d 78 (2014).

The City does not even cite any snippets of legislative history to support its arguments. Like the Court of Appeals, the City's argument that the Legislature intended MCL § 691.1402a to mean the same thing that the statute "always" had meant—and that the Legislature also intended this meaning to apply retroactively—is guided solely by its speculation about what the Legislature was intending, given the overall context of the larger, multi-decade debate over governmental immunity. All of this is based on the City's and the Court of Appeals' pure assumption that the Legislature must have intended for the amendment not only to change the law but also to apply retroactively. In other words, the Court of Appeals and the City are begging the very question that the City needed to prove in order to establish retroactivity here. This Court's precedent does not provide any basis for the Court of Appeals to do so.

D. The remainder of the City's contentions are either mistaken or irrelevant.

Finally, the City offers a grab-bag of additional arguments, none of which suffices to support the Court of Appeals' decision. For example, the City briefly wades into the doctrine of legislative acquiescence. (City Br. at 15). But that line of analysis is not relevant. The question is not whether the legislature (or some mix of legislators at some point in time) agreed with *Jones*; the question is whether, on January 3, 2017, the Legislature intended that its amendment

apply retroactively, even if it disagreed with *Jones*. The fact that the putatively restored "status quo" was more than 20 years distant by the time of the January 2017 amendment speaks to the fact that trying to apply the "*Brewer* restoration rule" is a fool's errand. As noted in Ms. Buhl's application for leave, pinning retroactivity to the nebulous question of whether a preexisting "status quo" has been fully or partially "restored" is an unavoidably uncertain and difficult endeavor. (Buhl App. for Leave, at 15-16). The creation of the "*Brewer* restoration rule" was neither permissible under this Court's precedent, nor did it result in a workable standard.

The City also argues that the same rules should govern both the retroactivity of judicial precedents that overrule prior judicial precedent and the retroactivity of legislative amendments that overturn judicial precedent. (City Br. at 17). But this argument highlights the flaws in the City's position. Judicial decisions are presumptively retroactively applicable and are limited to prospective-only application only in limited circumstances. *Rowland v Washtenaw Cty Rd Comm'n*, 477 Mich 197, 220; 731 NW2d 41, 55 (2007). The presumption for legislative amendments, on the other hand, is precisely the opposite: they are presumed to be prospective-only, unless the Legislature clearly expresses its intent for retroactive application. *Johnson*, 491 Mich at 429; *Davis v State Employees' Ret Bd*, 272 Mich App 151, 155–56; 725 NW2d 56 (2006). The City's attempted equivalence between the two types of amendments demonstrates that it is inverting the applicable presumption.

The City further suggests that the January 2017 amendment was merely "remedial" rather than a "substantive" change in the law. (City Br. at 17-18). But the City's argument that the amendment was not substantive depends upon its assertion that the January 2017 amendment changed nothing at all—that "2016 PA 419 vested Defendant with no defense that Defendant did not have before." (City Br. at 18). In view of the actual text added to the

statute by the amendment, the City's position defies reality. (App. 32a). There is no question that the January 2017 amendment effects a substantive change in the law rather than a merely remedial or procedural one. (Buhl App. for Leave, at 20).

The City also appears to argue that no claimant ever has substantive rights vis-à-vis a municipality, due to general principles of governmental immunity. (City Br. at 19-20). This argument is wrong, for reasons articulated in Ms. Buhl's application for leave. (Buhl App. for Leave, at 17-20). For example, amended statutes of limitations ordinarily may not apply retroactively because they "necessarily affect" the plaintiff's "substantive rights" by potentially limiting the plaintiff's ability to obtain relief. *Davis*, 272 Mich App at 160–61. This is true even though statutes of limitations only provide the defendant with an additional affirmative defense. *See id.*; *Dell v Citizens Ins Co of Am*, 312 Mich App 734, 752; 880 NW2d 280 (2015). The same analysis applies here.

Nor is the City helped by its analogy to cases like *Rookledge v Garwood*, 340 Mich 444, 457; 65 NW2d 785 (1954). *Rookledge* held that an amendment may retroactively remove a statutory defense from a defendant. In that scenario, neither the plaintiff nor the defendant has been deprived of a vested right. Here, by contrast, the legislative amendment adds a dispositive affirmative defense for the defendant, thereby potentially depriving the plaintiff of her vested right in her cause of action, in the same way that an amended statute of limitations would. *See Davis*, 272 Mich App at 160–61.

In any event, the question of retroactivity is a question of legislative intent, which primarily turns upon the words actually used by the Legislature. *See Davis*, 272 Mich App at 156 ("[T]he Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively."). The City avoids the language of the January 2017

amendment, likely because—as even the Court of Appeals recognized—it fully supports non-retroactive application of the amendment. Nor is there any support for the City's suggestion that legislative intent may be determined through different means in the context of legislation in the governmental-immunity context than in the context of other legislation. This Court's precedent has never indicated that the Legislature's intent may be divined through different means in one substantive legislative context than in another. *See, e.g.*, *LaFontaine*, 496 Mich at 38. The fact that this case arises in the context of a statute that touches upon governmental immunity does not mean that the Legislature expresses its intent differently in this context than in any other.

Relief Sought

As *Schilling* properly recognized, all of the applicable *LaFontaine* factors favor prospective, not retroactive, application of the January 2017 amendment to MCL § 691.1402a. This Court should grant Ms. Buhl's application for leave to appeal, reverse the opinion of the Court of Appeals, and remand the case to the trial court for further proceedings.

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